Supreme Court, U.S.
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No. 98-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PEGGY NELL HART,

Petitioner,

vs.

HAROLD B. O'BRIEN, FRANK MONTANA, C. T. "TOMMY" MYRICK, JEFF STARNES, and CARL MOTLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JEFF STARNES, CARL MOTLEY and C.T. "TOMMY" MYRICK

L. CHARLES VAN CLEEF
Counsel of Record
ROBERT S. DAVIS
COOPER, FLOWERS, DAVIS,
FRASER & DERRYBERRY, L.L.P.
Attorneys for Respondents Jeff Starnes, Carl Motley and C.T. "Tommy" Myrick
815 Rice Road
Tyler, Texas 75703
(903) 534-8063

150157

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Respondents C. T. "Tommy" Myrick, Jeff Starnes, and Carl Motley respectfully pray that the Supreme Court deny the Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 6, 1997, and the denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* dated July 23, 1998.

STATEMENT OF THE CASE

On August 11, 1992, during an aerial investigation, a marijuana field was discovered growing in close proximity to a residence occupied by David Conine and Petitioner Peggy Hart which was located on property adjacent to Conine's residence. The drug task force in the area, headed by Respondents O'Brien and Montana, began an almost two week surveillance of the Conine residence and the surrounding property. During the surveillance, the officers observed numerous activities which led the drug task force officials to believe that Petitioner was residing at the Conine residence and could have been involved with Conine in his marijuana manufacturing activities.[1] Petitioner admitted, and the officials observed, that she spent several night at Conine's trailer. On one of the nights that Petitioner spent at Conine's trailer, Petitioner and Conine had just returned from Louisiana and stayed overnight in a hotel together. Upon their return to Conine's trailer, the two were seen removing clothing from Conine's pickup truck and taking the clothing into Conine's trailer.

Petitioner also admitted that it was quite possible that she could have been seen drinking coffee on Conine's porch in the

1. Respondents Starnes and Motley were not involved in the surveillance or investigation of the property. Starnes was not directly involved until he assisted in the preparation of the affidavits for the warrants and was present during the actual arrest and search. Similarly, Respondent Motley was not involved in the investigation and was not present until the time of the arrest and search. Motley also filed the actual complaint against Petitioner.

mornings, and that she frequently did laundry at his trailer. In addition, Petitioner received telephone calls at Conine's trailer and watched television there with him. Similarly, Petitioner cooked for Conine in his trailer.

It is undisputed that Petitioner spent a great deal of time on Conine's property, where the marijuana was growing. Petitioner provided an innocent explanation for her many visits, but admitted the visits. Petitioner explained in deposition that she kept a horse on Conine's property. Petitioner was required to spend a great deal of additional time on his property caring for the injured horse. Petitioner would, in fact, frequently go into Conine's trailer to retrieve rags or towels or other items needed to care for the horse rather than returning to her own house. Petitioner kept the injured horse near Conine's barn and was in and out of the barn quite frequently. This was the same barn in which marijuana, cocaine, and other illegal items were found during the ultimate search of the property. Not only did Petitioner care for Conine's animals on his property (in addition to caring for her own horse which she boarded on the property), she also used a storage building located on his property to store furniture, a file cabinet, and numerous papers.

Petitioner was seen traveling in Conine's pickup truck. She admitted in her testimony that she would frequently go to town with Conine to pay electric bills, and they would occasionally eat out together. Petitioner also said that she traveled in the pickup truck with Conine to a trash dump site on the property. She testified that she never went all the way to the dump site, which required passage through a very large marijuana field surrounding the site, but remained at the gates that needed to be opened while Conine actually threw the garbage. Nevertheless, the officers did see her travel with Conine in the vicinity of the trash dump site.

It was undisputed that the marijuana plants were not confined to Conine's property and spread over onto adjacent tracts of land. Of the six different marijuana patches containing the 1,132 marijuana plants, patch number 6, containing 188 plants, was located just behind Peggy Hart's house. As a practical matter, the area included in the search was one large area. The warrant affidavit described it by a metes and bounds description of one large area, a hand drawn map which depicted the fence and the location of each building on the property to be searched, including the white house with black trim where Petitioner said she lived, Conine's trailer, as well as a written description of the house, the trailer, the barn, etc. Conine's trailer was on one side of the property, and Hart's white house with black trim was located on an adjoining side of the property; both backed up to the same field. Thus, regardless of which building Hart was "residing" in, it is undisputed that she was residing in the midst of a marijuana "farm" and she had a relationship with the "farmer" of the entire crop.

After the two week investigation, assistant County prosecutor, Jeff Starnes, assisted other officials in obtaining search and arrest warrants and in preparation of their supporting affidavits. It was undisputed that defendant Starnes (mistakenly) provided false information in the affidavits for search warrants and that he had the Petitioner confused with a different Peggy Hart who was married to a known drug cultivator.

On August 25, 1992, Peggy Hart and David Conine were arrested and taken to jail during the search of their property. The law enforcement officials discovered on Conine's property large amounts of incriminating evidence of the fact that marijuana was being grown and produced on the property. This included 1,132 live, growing marijuana plants, baggies of marijuana seed, and drug manufacturing equipment such as beakers, heat lamps, and condensers. Inside Conine's trailer, the officials found two scales

for weighing drugs, two bongs, two baggies of marijuana, the butt of a marijuana cigarette in an ash tray, cigarette papers, and almost $19,000 in cash.

On August 26, 1992, the day after Petitioner's arrest, bail was set at $50,000. Unfortunately for Petitioner, no one attempted to bail her out until a bond was posted on September 11, 1992.

REASONS FOR DENYING THE WRIT

JURISDICTIONAL REASONS

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF *CERTIORARI* AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT IT HAD JURISDICTION TO CONSIDER THE INTERLOCUTORY APPEAL FROM THE DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED ON ABSOLUTE AND QUALIFIED IMMUNITY.

The primary question presented by the Petition for Writ of *Certiorari* is whether the United States Court of Appeals for the Fifth Circuit erred in concluding that it had jurisdiction to consider an interlocutory appeal from the district court's decision denying Respondents' motion for summary judgment based on qualified immunity. The question turns on a determination of whether the circuit court correctly determined that, based on the undisputed facts, Respondents' actions violated clearly established law. In other words, the question turns on a determination of whether a reasonable public official under the same or similar circumstances presented to the Respondents could have believed that his or her actions were lawful, in light of clearly established law and the information that was undisputedly possessed by each official.

A court of appeals has jurisdiction of appeals from all final district court decisions. 28 U.S.C. § 1291. However, in *Mitchell v. Forsythe* this Court held that denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. 472 U.S. 511, 526, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985); *see also Coleman v. Houston Ind. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997) (" 'Denial of summary judgment on the ground of qualified immunity is immediately appealable to the extent that the question on appeal is whether the undisputed facts amount to a violation of clearly established law.' ") (quoting *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996)).

In *Johnson v. Jones*, 515 U.S. 304, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), this Court recently clarified the scope of *Mitchell* and squarely addressed the appealability of orders denying summary judgment on the basis of qualified immunity. In *Johnson*, the Court held that a defendant may not appeal such an order insofar as that order determines whether or not the summary judgment record sets forth a "genuine" issue of fact for trial. 515 U.S. at 319-20. In *Behrens*, the Respondent argued that an appeal of the district court's denial of summary judgment was not available under *Johnson* because the district court had concluded that "material issues of fact remained." 116 S. Ct. at 842. The Court was quick to point out, however, that the Respondent had misread *Johnson*, observing that the denial of summary judgment often includes a determination that there are controverted issues of material fact and that "*Johnson* surely does not mean that every such denial of summary judgment is nonappealable." *Id.* Rather, the Court explained,

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not

> immediately appealable merely because they arise in a qualified-immunity case[.]

Id. This Court then held that "*Johnson* permits a defendant to claim on appeal that all of the conduct which the district court deemed sufficiently supported for purposes of summary judgment" was objectively reasonable, and further instructed that where the district court has not identified the particular charged conduct that it deemed adequately supported,

> *Johnson* recognizes that under such circumstances "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Id. (quoting *Johnson*, 515 U.S. at 319).

The *Johnson* and *Behrens* decisions rest on the recognition that when a district court denies a motion for summary judgment on the ground that "genuine issues of material fact remain," the court has made two distinct legal conclusions. First, the Court has concluded that the issues of fact in question are genuine, *i.e.*, the evidence is sufficient to permit a reasonable fact finder to return a verdict for the nonmoving party. *See Ginsberg 1985 Real Estate Partnership v. Cadle Co.*, 39 F.3d 528, 531 (5th Cir. 1994) (defining "genuineness"). Second, the Court has concluded that the issues of fact are material, *i.e.*, resolution of the issues might affect the outcome of the suit under governing law. *See id.* (defining "materiality"). *Johnson* makes clear that an appellate court may not review a district court's determination that the issues of fact in question are genuine. As this Court explained in *Behrens*,

> determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity

> case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the Petitioner's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.[2]

116 S. Ct. at 842. *Behrens*, on the other hand, makes clear that an appellate court is free to review a district court's determination that the issues of fact in question are material, which is exactly the analysis undertaken by the appellate court in this case.

The Fifth Circuit held, in relevant part:

> In the instant case, the District Court did not deny summary judgment because there was a genuine dispute of material fact that the officials are responsible for searching Hart's home, arresting her, and not taking any action in her detention. The parties did not disagree over whether the officials had engaged in such conduct. Rather, the court denied summary judgment because (1) "disputed issues of material fact" existed over

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2. In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), the Court held that orders

> which finally determine claims of right separable from, and collateral to, rights asserted in [an] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,

are "final decisions" under 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), the Court held that a district court's order denying a defendant's motion for summary judgment on the basis of qualified immunity, to the extent it turns on an issue of law, is appealable under *Cohen*.

> whether the officials violated Hart's clearly established constitutional rights of which a reasonable person would have known . . . and (2) the underlying facts are too unsettled to determine if the officials acted with objective reasonableness. In short, the District Court determined that there were sufficient time contested facts to establish that the officers engaged in the conduct in question, but that there were insufficient uncontested facts to decide whether the officials enjoy immunity as a matter of law. Hence, the officials may argue on interlocutory appeal (as they do here) that, contrary to the District Court's judgment, enough uncontested facts existed to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. . . .

Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997) (citations omitted). Thus, the circuit court engaged in the precise analysis expressly allowed by this court in *Behrens*, to wit, a determination of whether the factual issues relied upon by the district court in denying summary judgment were, in fact, "material," as a matter of law, to a determination of whether Respondents were entitled to qualified immunity. The circuit court correctly determined that there were no genuine issues of *material* fact and that Respondents were entitled to judgment as a matter of law.

In this case, the material facts of the investigation and arrest were undisputed. All that remained to be resolved following the district court's denial of Respondents' motion for summary judgment was a determination of whether those undisputed facts established "probable cause" for the arrest. On appeal, Respondents contended that the undisputed facts established probable cause and, at the very least, that reasonable minds could differ concerning whether those facts constituted probable cause. Under the Supreme Court's decision in *Malley v. Briggs*, 475 U.S. 335, 344-45, 106

S. Ct. 1092, 89 L. Ed. 271 (1986), if reasonable minds could differ on whether there was probable cause to arrest Petitioner, then the officials enjoy qualified immunity as a matter of law. The first portion of the Petition for Writ of *Certiorari* implicitly acknowledges that the circuit court undertook such an analysis:

> Issues regarding the facts possessed by the defendants at the time of the search and arrest are hotly disputed. *These disputes are material by any definition.* Simply put, the Fifth Circuit did not have jurisdiction to hear the present appeal under *Johnson, supra,* because the denial of summary judgment on the basis of qualified immunity *was based on material factual disputes.*

Petition for Writ of *Certiorari* at 8-9 (emphasis added). The circuit court correctly determined that the issue presented by Respondents was a legal issue that could be determined in an interlocutory appeal.

II.

THIS COURT SHOULD NOT GRANT *CERTIORARI* BASED ON PETITIONER'S ASSERTION THAT THE CIRCUIT COURT'S OPINION WILL "OPEN UP THE FLOOD GATES OF LITIGATION MAKING VIRTUALLY EVERY DENIAL OF SUMMARY JUDGMENT IN QUALIFIED IMMUNITY CASES IMMEDIATELY APPEALABLE."

The circuit court's conclusion that it had jurisdiction to consider Respondents' interlocutory appeal was expressly and correctly based on this Court's a decision in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). As quoted above, the circuit court found:

> [T]he officials may argue on interlocutory appeal (as they do here) that, contrary to the District Court's

> judgment, enough uncontested facts existed to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. *Behrens v. Pelletier*, __ U.S. __, 116 S. Ct. at 842; *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997).

Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997). Hence, the circuit court merely applied the legal principle established in *Behrens* that a circuit court has jurisdiction to consider whether contested facts relied upon by a district court denying qualified immunity are "material," and the corollary that a circuit court has jurisdiction to consider whether the uncontested facts are sufficient to establish entitlement to qualified immunity as a matter of law.

Rather than "making the determination regarding genuine issues of fact appealable whenever there [are] any undisputed facts," as Petitioner contends, the circuit court merely applied established precedent and held that an official may appeal the denial of qualified immunity when there are sufficient undisputed facts to establish entitlement to immunity as a matter of law.

III.

THE COURT SHOULD NOT GRANT THE PETITION FOR *CERTIORARI* BASED ON PETITIONER'S ASSERTION THAT THE LOWER COURTS ARE IN HOPELESS DISARRAY IN APPLYING *JOHNSON* AND *BEHRENS*.

Petitioner's assertion that "[t]he Courts of Appeal are in complete disarray in applying *Johnson* and *Behrens*, and there is no consistency either within circuits or between the circuits in application of these cases" is simply incorrect. As an example of alleged lack of consensus within the Fifth Circuit, Petitioner cites the 8 to 8 vote in determining whether to rehear, *en banc*, the case of *Colston v. Barnhardt*, 146 F.3d 282, 286 (5th Cir. 1998).

However, the "complex panorama of doctrine and dissent" referred to in Judge DeMoss's dissent in *Colston* has been resolved. In *Colston*, the dissent concluded that the issue of the objective reasonableness of an official's actions could not be separated from the merits of the action, and that an order denying qualified immunity based on a factual dispute concerning objective reasonableness could not be subject to the collateral orders doctrine. *Id.* at 287.

Since the publication of Judge DeMoss's dissent, the Fifth Circuit has taken the opportunity to solve the apparent dilemma concerning appeals based on alleged objective reasonableness of an official's actions. In *White v. Balderama*, 153 F.3d 237, 1998 U.S. App. LEXIS 21253, *12 (5th Cir. 1998), the Fifth Circuit acknowledged the *Johnson* and *Behrens* decisions, noted that objective reasonableness is determined as a matter of law, and merely observed that a district court's general conclusion that genuine issues of material fact preclude judgment as a matter of law — without specifying those facts — leaves the circuit court unable to tell whether the official is making a reviewable materiality challenge or an unreviewable genuineness challenge on appeal." *White*, 153 F.3d at __, 1998 U.S. App. LEXIS 21253 at 12. The circuit court ultimately made

> a limited remand to the District Court for the purpose of allowing it to articulate specifically what factual scenario it believes emerges from viewing the summary judgment evidence in the light most favorable to [the non-movant].

Id., 1998 U.S. App. LEXIS 21253 at 13. In the same case, the Fifth Circuit restated its holding in *Colston*:

> In *Colston v. Barnhardt*, 146 F.3d 282 (5th Cir. 1998), *denying reh'g in* 130 F.3d 96 (5th Cir. 1997), we recently observed that when a District Court denies

summary judgment on the basis that genuine issues of material fact exist, it has made the following distinct legal conclusions:

> First, the court has concluded that the issues of fact in question are genuine, *i.e.*, the evidence is sufficient to permit a reasonable fact finder to return a verdict for the nonmoving party [with respect to the particular fact issues]. Second, the court has concluded that the issues of fact are material, i.e., resolution of the issues might affect the outcome of the suit under governing law.

Id. at 284 (citations omitted).

Id.; 1998 U.S. App. LEXIS 21253 at 6. The holding in *Colston* is entirely consistent with this Court's holdings in *Johnson* and *Behrens*. Moreover, since, in the case at bar, the district court made specific findings regarding the factual scenario that emerged in its determination and therefore enabled the circuit court to determine whether the disputed facts were material, the alleged confusion cited by Petitioner is irrelevant to consideration of the issues presented in the Petition for Writ of *Certiorari*.

In sum, while other circuit courts may have produced conflicting opinions regarding the interpretation of *Johnson* and *Behren's*, the Fifth Circuit's decision in the case at bar is not emblematic of any such confusion.

QUALIFIED IMMUNITY REASONS

I.

THE CIRCUIT COURT'S OPINION DOES NOT "EXPAND QUALIFIED IMMUNITY AT THE EXPENSE OF ORDINARY CITIZENS," AS PETITIONER CONTENDS.

Petitioner contends that the opinion of the circuit court represents an "attempt to expand qualified immunity at the expense of ordinary citizens." Petition for Writ of *Certiorari* at 16. The basis for Petitioner's contention is that the circuit court's opinion erodes Fourth Amendment protections, "including the long accepted principle that a facially valid search warrant is void when it is obtained on the basis of an affiant's false statement . . ." *Id.* This contention is apparently based on Respondent Starnes' admittedly incorrect belief that Petitioner was the Peggy Hart that was married to a reputed drug cultivator, Stanley Hart.

The circuit court correctly observed that Respondent Starnes did not sign the affidavit and was not present when Respondent O'Brien requested the warrant, but that Respondent Starnes did help draft the affidavit and was the exclusive source of the inaccurate information about Petitioner's marital status. *Hart v. O'Brien*, 127 F.3d 424, 432 (5th Cir. 1997). Based on the fact that Petitioner alleged that Starnes provided false information intentionally or recklessly, the circuit court concluded that Petitioner stated a claim for violation of her Fourth Amendment rights. *Id.* at 449. The circuit court then squarely addressed the issue of whether Respondent Starnes demonstrated that there were no genuine issues of material fact regarding his assertion that he did not violate any of Petitioner's clearly established Fourth Amendment rights; in other words, that he did not intentionally or recklessly include false information in the affidavit. *Id.*

The circuit court concluded that there was no evidence that Respondent Starnes knew the information was inaccurate before giving it to Respondent O'Brien to be included in the affidavit. *Id.* The court further concluded that although Respondent Starnes knew the other Peggy Hart, there was no evidence that he had any reason to believe that "there might be two Peggy Harts within this rural community so as to raise serious doubts as to the accuracy of his statements to O'Brien." *Id.*

In sum, the circuit court's analysis of Respondent Starnes' entitlement to qualified immunity did not rest on a question of whether the given set of undisputed facts were material, but rather on a question of whether the evidence presented any genuine issues of fact. The analysis was based on well-established principles governing summary judgment review.

II.

THE CIRCUIT COURT DID NOT HOLD THAT AN OFFICIAL WHO KNOWINGLY OR RECKLESSLY GIVES FALSE INFORMATION AND WITHHOLDS EXCULPATORY INFORMATION IN THE PROCUREMENT OF A WARRANT IS SHIELDED BY QUALIFIED IMMUNITY; PETITIONER'S ASSERTION TO THE CONTRARY IS SIMPLY WRONG.

The circuit court did not hold that an official who knowingly or recklessly gives false information and withholds exculpatory information in the procurement of a warrant is shielded by qualified immunity; Petitioner's assertion to the contrary is simply wrong.

The legality of a warrant is determined in light of the information available to police officers at the time they obtain it. *Maryland v. Garrison*, 480 U.S. 79, 85-86, 107 S. Ct. 1013, 1018, 94 L. Ed. 2d 72 (1987). A facially valid warrant is void when it is obtained on the basis of an Affiant's false statement that he knowingly and intentionally made, or made with reckless disregard

of the truth and if the false statement is necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

As stated above, the circuit court found that there were no genuine issues of fact to contradict Respondent Starnes' allegation that he did not intentionally, deliberately, or recklessly provide false information for inclusion in the affidavit. *Hart*, 127 F.3d at 449-50. The circuit court correctly determined that Petitioner did not present any evidence that Respondent Starnes intentionally, deliberately, or recklessly misinformed the officer who made the affidavit, *Id.*; moreover, for purposes of this Court's review, Petitioner does not assert that the circuit court's determination was erroneous. While it is undisputed that Respondent Starnes learned, sometime before the execution of the warrant, that Stanley Hart had become a drug counselor and was presumably no longer a marijuana cultivator, the circuit court correctly determined that there was no evidence "to impugn the truthfulness of his statement that Stanley Hart is someone known to have cultivated marijuana." *Id.* at 449, n.12.

In sum, the circuit court's analysis of Respondent Starnes' entitlement to qualified immunity did not rest on a question of whether the given set of undisputed facts were material, but rather on a question of whether the evidence presented any genuine issues of fact. The analysis was founded on well-established principles governing summary judgment review.

III.

THERE IS NO AUTHORITY FOR THE PROPOSITION THAT A PROSECUTOR/LEGAL ADVISER WHO IS PRESENT AT A SEARCH TO INFORM LAW ENFORCEMENT OFFICERS OF HIS DOUBTS THAT THE WARRANT SHOULD BE EXECUTED AS WRITTEN.

Neither Petitioner nor Respondents have been able to uncover any direct authority for the proposition that a prosecutor "tagging along on a search" has a duty to inform law enforcement officers that he has doubts that the warrant should be executed as written. Petitioner's contention apparently addresses the alleged inaction of Respondent Starnes when he realized, upon seeing her in the front yard of the property to be searched, that Petitioner was not the Peggy Nell Hart he identified as being married to Stanley Hart. Of course, there is no contention that Petitioner is other than the Peggy Nell Hart who was observed by the drug task force in and around the marijuana crops. Respondent Starnes was not an "officer," did not make an arrest, and had no apparent authority to countermand the dictates of the warrant; Petitioner's intimations to the contrary should be unavailing as they are unsupported and insupportable by any evidence in the record that was presented to the district and circuit courts.

Qualified immunity is intended to protect individuals, when sued in their individual capacity, from personal liability when the area of law is evolving. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id.

In light of the complete lack of any direct case law or statutory authority on this question, the circuit court, citing *Harlow*, correctly determined that there were no genuine issues of material fact and Respondent Starnes was entitled to qualified immunity as a matter of law because he did not violate a clearly established right by failing to stop the search.

CONCLUSION

For the reasons stated above, Respondents C.T. "Tommy" Myrick, Jeff Starnes and Carl Motley respectfully request that the Court deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

L. CHARLES VAN CLEEF
Counsel of Record
ROBERT S. DAVIS
COOPER, FLOWERS, DAVIS,
FRASER & DERRYBERRY, L.L.P.
Attorneys for Respondents
Jeff Starnes, Carl Motley
and C.T. "Tommy" Myrick
815 Rice Road
Tyler, Texas 75703
(903) 534-8063